

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA)	
)	Case No. 7:07MJ00580
v.)	
)	By: Michael F. Urbanski
NATHANIEL YALARTAI)	United States Magistrate Judge
)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on Defendant Nathaniel Yalartai’s Motion to Dismiss this case with prejudice following the government’s eight month delay in filing an indictment in violation of the Speedy Trial Act. The United States has responded by filing a Motion to Dismiss without prejudice. A hearing was held on September 3, 2008, at which time argument was presented by counsel. For the reasons set forth herein, Defendant’s Motion to Dismiss is **GRANTED** and this case is dismissed with prejudice.

I.

Defendant Nathaniel Yalartai (“Yalartai”) was arrested after allegedly entering a Roanoke area post office on October 4, 2007 and attempting to cash a \$1,000 money order, which had been purchased with proceeds from counterfeit checks. On October 30, 2007, a criminal complaint was issued against Yalartai, charging him with bank fraud and criminal conspiracy pursuant to 18 U.S.C. §§ 371, 1344. The court held an initial appearance and detention hearing on October 31, 2007, and at a preliminary hearing on November 14, 2007, the court found probable cause for both counts. Defendant remained in custody until December 17, 2007, at which time he was released on a \$40,000 secured bond.

The United States failed to file either an information or indictment against Yalartai within thirty (30) days following his arrest. In fact, the government took no action whatsoever on this case for eight months. On July 16, 2008, Yalartai filed a Motion to Dismiss the case with prejudice, arguing his speedy trial rights had been violated. The United States responded by filing a Motion to Dismiss without prejudice on August 22, 2008, claiming the delay was due to the ongoing fraud investigation involving multiple co-conspirators.

The parties appeared, by counsel, at a hearing held on September 3, 2008. The court gave each party seven (7) days following the hearing to brief the issues further; neither party elected to file an additional brief.

II.

By statute, an information or indictment charging an individual with the commission of an offense must be filed within thirty (30) days from the date on which such individual was arrested or served with a summons in connection with the charges. 18 U.S.C. § 3161(b). If an information or indictment is not filed within thirty (30) days, the charge must be dismissed. 18 U.S.C. § 3162(a)(1).

The decision to dismiss a case with or without prejudice for failure to comply with the Speedy Trial Act is within the discretion of the court. United States v. Taylor, 487 U.S. 326, 335 (1988). Legislative history confirms that Congress did not intend for either type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation. Id. at 334.

In determining whether to dismiss a case with or without prejudice for a violation of the Speedy Trial Act, the court must consider, inter alia, three factors outlined in 18

U.S.C. § 3162(a)(1): (a) the seriousness of the offense; (b) the facts and circumstances of the case which led to the dismissal; and (c) the impact of a re prosecution on the administration of this chapter and on the administration of justice. The Supreme Court has held that prejudice to the defendant is also a relevant factor for the court's consideration. Taylor, 487 U.S. at 334.

III.

In this case, the government's failure to file an indictment within thirty (30) days of Yalartai's arrest, as required by 18 U.S.C. § 3161(b), is a clear violation of the Speedy Trial Act. Thus, by statute, the charges against Yalartai must be dismissed. See 18 U.S.C. § 3162(a)(1). The only question before the court is whether the dismissal should be with or without prejudice.

The first factor the court must consider is the seriousness of the offenses charged, bank fraud and criminal conspiracy. 18 U.S.C. §§ 371, 1344. When a charge is serious, "the sanction of dismissal with prejudice should ordinarily be imposed only for serious delay." United States v. Jones, 887 F.2d 492, 495 (4th Cir. 1989) (quoting United States v. Carreon, 626 F.2d 528 (7th Cir. 1980)). Yalartai argues that the charges at issue should not be considered serious, as they do not involve violence, drugs or guns. The United States contends that the charges are serious, because the alleged conspiracy involves a significant amount of money.

At the hearing of this matter, the Assistant United States Attorney represented to the court that the alleged financial fraud involves a number of counterfeit checks in amounts of up to \$10,000, \$25,000 and \$100,000. Although there has been no indication of violent behavior on the part of Yalartai, the undersigned cannot ignore the significance

of the alleged conspiracy and finds the crimes charged to be serious for purposes of 18 U.S.C. § 3162(a)(1). See, e.g., U.S. v. Scott, 270 F.3d 30, 58 (1st Cir. 2001) (“Bank fraud is a serious offense which carries with it a maximum sentence of 30 years' imprisonment under 18 U.S.C. § 1344.”); U.S. v. Castle, 906 F.2d 134, 138 (5th Cir. 1990) (finding pursuant to a § 3162(a)(2) analysis that bank fraud is a serious offense); cf. United States v. Jones, 887 F.2d 492, 495 (4th Cir. 1989) (holding five counts of mail fraud were considered “very serious” crimes). This first factor weighs in favor of the government.

Secondly, the court must consider the facts and circumstances of the case which led to dismissal. At the hearing, the United States argued that the delay in indicting Yalartai was due to the ongoing investigation of this complex conspiracy involving multiple co-conspirators who reside in a number of different states and in Africa. The government claims Yalartai is but one link in the chain of a larger conspiracy, and the United States indicated a desire to indict all co-conspirators at one time. The Assistant United States Attorney also stated that she only recently had been transferred this case.

While the court appreciates that the Assistant United States Attorney responsible for this case has only recently been tasked with it, the transfer of a file within the office should not substantially delay its timely prosecution. Further, although this case involves a conspiracy, many others do as well, and this fact does not justify such a long delay. At the time Yalartai filed his Motion to Dismiss on July 16, 2008, 259 days had passed since his arrest. Thus, an indictment still had not been filed 229 days after expiration of the thirty (30) day period mandated by the Speedy Trial Act. 18 U.S.C. § 3161(b). The government represented to the court at the September hearing that its delay in filing an indictment was not an effort to prejudice defendant. The court indeed finds no evidence

of bad faith on the part of the government. However, a 229 day violation of the Speedy Trial Act is too egregious to ignore.

“The length of delay... in some ways is closely related to the issue of the prejudice to the defendant. The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty” United States v. Taylor, 487 U.S. 326, 340 (1988). The delay in this case is significant, and Yalartai argues that he has been prejudiced. Yalartai was incarcerated for well over a month during this eight month delay and was thereafter placed on pretrial supervision. He claims that the terms and conditions of his pretrial release have been a barrier to his ability to obtain gainful employment. His family posted \$40,000 in property to secure his bond, and that property still remains tied up as collateral for the bond. Yalartai further contends that his ability to prepare his defense has been prejudiced by the delay, as no discovery has been conducted and, at this point, defense witnesses may be unavailable or unable to be located.

The undersigned finds that the excessive delay has prejudiced defendant and undoubtedly caused anxiety for both Yalartai and his family. The court notes that had Yalartai not filed his Motion to Dismiss in July, this case might still be sitting on the docket without any effort by the United States to indict or further prosecute. The government’s ongoing investigation of this matter does not excuse the Speedy Trial Act violation; the Act does not carve out an exception for complex conspiracy investigations. There is simply no reason why the government could not have moved to dismiss the case without prejudice to reprosecution within the thirty (30) days following Yalartai’s arrest. Likewise, the United States could have indicted Yalartai within the requisite time period

and then filed a superceding indictment once all co-conspirators were located. The court finds the 229 day violation of the Speedy Trial Act to be a serious delay.¹ This factor weighs heavily in favor of dismissal with prejudice.

Finally, the court must consider the impact of re prosecution on the administration of the Speedy Trial Act and on the administration of justice. “The Speedy Trial Act is intended to mandate an orderly and expeditious procedure for federal criminal prosecutions by fixing specific, mechanical time limits within which the various progressions in the prosecution must occur.” U.S. v. Iaquina, 674 F.2d 260, 264 (4th Cir. 1982). The instant case involves a 229 day violation of 18 U.S.C. § 3161(b); re prosecution would essentially provide an end run around the Speedy Trial Act.

Furthermore, justice would not be served by permitting re prosecution after such an unreasonably long length of time. As discussed supra, Yalartai has suffered prejudice as a result of the eight month delay in prosecution. While the government represents its investigation is ongoing and its delay was unintentional, the court cannot ignore the lapse of 259 days without indictment following Yalartai’s arrest. Justice can still be served with respect to prosecuting the alleged conspiracy. Yalartai is the only person who has been arrested;² all others remain at large and charges against them remain available. Dismissing the case against Yalartai without prejudice and allowing re prosecution would not be just considering the facts and circumstances of this case.

¹ See U.S. v. Jones, 887 F.2d 492, 495 (4th Cir. 1989) (when a charge is serious, the sanction of dismissal with prejudice should ordinarily be imposed only for serious delay).

² The court notes that the criminal complaint filed in this case indicates that Yalartai was arrested attempting to cash a \$1,000 money order which the government claims had been purchased with proceeds from counterfeit checks. At the hearing in this matter, the government represented that the alleged conspiracy involves a number of counterfeit checks in amounts of up to \$100,000. Thus, the evidence suggests that Yalartai is but a small part of this alleged conspiracy.

On balance, the three factors outlined in 18 U.S.C. § 3162(a)(1) tip in favor of dismissing this case with prejudice. While the court considers the charges to be serious in nature, the 229 day violation of the Speedy Trial Act is a significant delay that has prejudiced Yalartai. Accordingly, Defendant's Motion to Dismiss this case with prejudice is **GRANTED** and the United States' Motion to Dismiss without prejudice is **DENIED**.

It is so Ordered.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Entered this 23rd day of September, 2008.

/s/ Michael F. Urbanski
United States Magistrate Judge